5 Otto 722
Const. Pen. 1874
art 16. 3. 5

6 Otto 369
Oct. 7. 1877

83 to 128, inclusive, except 121.

No. 784 *October Sessions, 1877.*

In the Circuit Court of the United States.

WILLIAM SCHOLLENBERGER AND
WILLIAM SCHOLLENBERGER, Sr.,

vs.

FOREIGN INSURANCE COMPANIES.

PETITION FOR A RULE FOR A MANDAMUS.

R. C. McMURTRIE,
A. SYDNEY BIDDLE,
Attorneys for Plaintiffs.

Allen, Lane & Scott, Printers, 223 South Fifth Street, Philadelphia.

In the Circuit Court of the United States.

William Schollenberger and William Schollenberger, Sr.,	October Sessions, 1877.
vs.	
Foreign Insurance Companies.	No. 83 to 128, inclusive, except 121.

PETITION FOR A RULE FOR A MANDAMUS.

William Schollenberger and William Schollenberger, Sr., partners, trading as William Schollenberger & Son, by R. C. McMurtrie and A. Sydney Biddle, their attorneys, move the court for a rule upon the Hon. William McKennan and John Cadwallader, judges of the Circuit Court of the United States for the Eastern District of Pennsylvania, to show cause why a writ, commonly called a writ of mandamus, should not be issued out of the office of the Supreme Court of the United States, commanding them to hear and determine certain suits brought by the petitioners against certain corporations in the said Circuit Court of the United States, and also to strike from the record certain orders made by them in the said case on the thirteenth day of April, 1878, whereby the service of the writs in the said suits were quashed, and thereupon to make

such order or disposition of the suits as ought to have been made, had the said orders to quash the service not been made.

The plaintiffs are citizens of the State of Pennsylvania, and are transacting business therein. The defendants in the above-mentioned suits are corporations, severally chartered by some one of the United States (other than the State of Pennsylvania), for the purpose of effecting insurances of property against loss by fire.

By a statute of the Commonwealth of Pennsylvania (Pamphlet Laws of Pennsylvania of 1868, pages 83–90), entitled *an act to revise, amend, and consolidate the several laws regulating the licensing of foreign insurance companies*, foreign corporations for conducting the business of insurance were licensed to conduct their said business within the State of Pennsylvania. The petitioners pray your Honors to consider the whole of said act as incorporated in this petition. Prior to that time such business was illegal and prohibited within the State. The statute licensing the said foreign corporations to transact business within the State enacts, *inter alia*—

(28.) It shall not be lawful for any fire, marine, or life insurance, trust, or annuity company, or any health or casualty company, or any company for the insurance of horses, mules, cattle, and live stock, or for insurance companies, firms, associations, or copartnerships of any character or description, whether the same are established upon the stock or mutual principle or plan, incorporated by any other State of the United States, or by any foreign government, or organized under the laws thereof, directly or indirectly, to take risks or transact any business of insurance, or accept trusts or grant annuities in this State, unless possessed of cash assets safely invested amounting to at least $200,000, except as hereinafter provided.

(29.) Any such insurance, trust, or annuity company, firm, or association, desiring to transact business in this State, shall first appoint an agent or attorney resident in this State, on whom process of law can be served (*a*) and file in the office of the Auditor-General of this Commonwealth a certified copy of the resolution of the board of directors or managers of such company, firm, or association appointing such

attorney or agent, which appointment shall continue until another agent or attorney be substituted, and also a certified copy of a charter or other authority under which said company or association is organized. And the president, vice-president, or secretary of every such company or association shall, on the first Monday of January of each and every year in which they shall transact business in this State, or within one month thereafter, prepare, under oath or affirmation, and file in the office of the Auditor-General, a statement of the condition of the company or association on the thirty-first day of December then next preceding, or at the date of the balance sheet of the company presented to stockholders at the annual meeting last preceding, exhibiting the following facts and items, viz.:—

The defendants, each and every of them, before the making of the contracts of insurance with the petitioners, did accept the provisions of the said statute and did appoint an agent resident in the said State on whom process of law could be served or otherwise, in this respect complying with the stipulations of the statute. And the said companies did, after thus appointing an agent, and have hitherto, to the present time, transacted business in the said State of Pennsylvania, as insurers against loss by fire. And they did, after the acceptance of the said license and within the State of Pennsylvania, and within the jurisdiction of the said Circuit Court of the United States, make a contract of insurance with the petitioners upon property situated within the said State and within the jurisdiction of said court. And afterwards a fire and damage occurred to the property in September, 1877.

That afterwards suits were brought against the said companies respectively in the said courts, and writs of summons in actions of debt on said policies were issued out of the said court, returnable on the first Monday of April, 1878, and declarations were filed in which the plaintiffs were described as

Citizens of the State of Pennsylvania, and the defendants were respectively described as a "body corporate, created under the laws of [the proper State] and having its principal place of business in said State,

and are a body corporate, exercising within the State of Pennsylvania, under a license granted by the said State, their corporate rights, powers, and privileges in the making of contracts of insurance such as that on which this action is brought."

And the said writs were duly served by the United States marshal of the eastern district of Pennsylvania, upon the person who for the time then being, in each case, was the agent of the respective defendant, who had been and was then appointed by the said defendant as its agent resident in the said State, on whom process of law could be served.

These writs were duly returned by the marshal, with the return endorsed thereon in manner following:—

"March 1st, 1878, at Philadelphia, in my district, served the within writ on [here follows the name of the foreign insurance company] by reading the same in the hearing of [here follows name of defendant's agent] agents of said company, and leaving a true and attested copy thereof with him. So answers

JAMES N. KERNS,
U. S. Marshal.

Thereupon motions were made by the attorneys of the persons served, using the agents as aforesaid, to quash the service of the writs upon the ground that the defendants were not liable to be served with the process of the United States Circuit Court, as they were not *inhabitants of* nor *found within* the district when said process was served.

And afterwards, to wit, upon the thirteenth day of April, the said court being of opinion that the said court had no jurisdiction over the said defendants under the circumstances above stated, and that the process of the court could not be effectually and lawfully served on them by serving the agent of the defendants resident within the district and appointed by the defendants in accordance with the foregoing statute, or wherein process of law might be served, ordered the service of the said writs to be quashed.

The petitioners are thereby prevented from exercising their right to sue the defendants in the manner they are advised they are entitled to do by the act of Congress of 3d March, 1875—that is to say, in that district in which the defendants did make the contract sued on, and in which they are and were at that time, and at the time of the service of the said writs, conducting the business of insurance, and in which at that time they were required by law to have an agent on whom process might be served; whereas the petitioner is advised that the process of the court can be served upon the person and in the manner directed by the law of Pennsylvania for the time being, and that said service was a sufficient service and vested the jurisdiction of the cause in the said Circuit Court. And the petitioners further say that they are without any remedy to compel the Circuit Court to exercise the said jurisdiction, inasmuch as the said orders quashing the service of the writs is not a judgment to which a writ of error lies, therefore your petitioners pray that the said rule may be granted returnable to such a day as to your Honors may seem fit.

WILLIAM SCHOLLENBERGER,
WILLIAM SCHOLLENBERGER, Sr.

William Schollenberger, being duly according to law, says:—I am one of the within petitioners. The facts therein stated are true, to the best of my knowledge and belief.

WILLIAM SCHOLLENBERGER.

and subscribed to, this thirteenth day of April, 1878, before me, a notary public of the State of Pennsylvania.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

No. 7. Original; October Term, 1877.

The UNITED STATES, at the instance of WILLIAM SCHOLLENBERGER and WILLIAM SCHOLLENBERGER, Senior,

vs.

The JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

RETURN TO ORDER TO SHOW CAUSE.

KILDARE'S PRINTING HOUSE, 704 & 706 SANSOM ST., PHILADELPHIA.

IN THE

SUPREME COURT

OF THE UNITED STATES.

No. 7. Original; October Term, 1877.

The UNITED STATES, at the instance of WILLIAM SCHOLLENBERGER and WILLIAM SCHOLLENBERGER, Senior,

versus

The JUDGES of the CIRCUIT COURT of the UNITED STATES for the EASTERN DISTRICT of PENNSYLVANIA.

RETURN TO ORDER TO SHOW CAUSE.

WHEREAS, It was, on the 15th day of April, 1878, ordered by the said Supreme Court that the Judges of the said Circuit Court, on the 22d day of the same month, or as soon, etc., show cause why a writ of Mandamus should not issue, commanding them to hear and determine the suits mentioned in the petition of William Schollenberger and William Schollenberger, Senior, in which such an order was prayed, and to strike from the record of the said suits the orders quashing the service of the writs therein mentioned.

Now the Judges of the said Circuit Court, in return to the said order, submitting to the Supreme Court the ques-

tion whether the case is a proper one for the remedy by writ of Mandamus, answer as follows:

The facts in the said petition alleged are truly stated therein.

The respondents have declined to hear and determine the said suits, because, in their opinion, the said Circuit Court has no competent jurisdiction thereof, the several and respective defendants not having appeared therein, or, in any wise, submitted to the jurisdiction of the Court, and not having been at the commencement of the respective suits, or at any time, *inhabitants of, or found in*, the said district, within the meaning of the Act of Congress of March 3, 1875, re-enacting a like provision of the 11th section of the act of September 24, 1789.

The question under this enactment being one of jurisdiction, and not of mere procedure, the legislation of Pennsylvania, mentioned in the said petition, was, in the opinion of the respondents, inapplicable. The service of the process in the said suits was therefore set aside, as unauthorized.

The reasons of the respondents are, in some respects more fully stated in a note hereto appended.

Respectfully submitted.

WM. MCKENNAN,
JOHN CADWALADER.

NOTE.

Normally, the seat of justice, when proceedings are *in invitum*, is the home of the defendant, or the place he may be served personally with process. *Actio sequitur reum.* The exercise of original compulsory jurisdiction elsewhere, by local arrest of his property, or by what is called *substituted service* on his local agent, is, when allowed, an exceptional privilege of the creditor. But such a privilege may reasonably be allowed, in certain cases, in the exercise of internal jurisdiction, by the ordinary tribunals of a nation or State. Thus the process of foreign attachment, limited to the property of non-residents which is actually within the territorial limits of the State or country, is not generally considered objectionable.

It seems that, in England, the process in a suit against a foreign corporation upon its contract made by its general local agent, may now be served on such agent. Laws of several of the States of our Union, including the Act of Pennsylvania mentioned in the petition, authorize foreign corporations of certain kinds to transact business within the respective States on the condition of maintaining a local agency in such manner that process against the corporation may be served on the agent. The Supreme Court of the United States has considered such a condition reasonable and proper (The Lafayette Insurance Company *vs.* French, 18 Howard 404). On the same principle, Congress, in legislating as to judicial proceedings in the District of Columbia, enacted, in 1867, that in actions against foreign corporations doing business in that district, all process may be so served (14 Ll. U. S. 404). This is one of the Acts of Congress which are called by the Supreme Court of the United States "local to the district" (Railroad Company *vs.* Harris, 12 Wallace 65, on p. 86). They do not constitute any part of what may properly be called the judicial system of the United States.

Considerations, in many respects different, apply to questions of original jurisdiction, under the judicial system of the United States. As the system has been organized, original jurisdiction is apportioned according to a territorial division into districts, not one of which is composed of two States, or of parts of any two States. But the purposes of this territorial division do not require that as extended a system of internal jurisprudence, in all respects, shall be organized under the Federal government within the limits of each State, as may exist under laws of the State.

Where the Federal jurisdiction is exercisable, Acts of Congress indeed adopt, for the Federal courts, the forms and modes of procedure in use in the several States. But these acts do not enlarge or define the original jurisdiction of the Federal courts, or assimilate it to that of the State courts. The acts merely regulate the exercise of jurisdiction where it is already competent, as originally defined.

In a case in which it was decided that State legislation could not limit or restrain the exercise of the judicial power of the United States under authority given by Congress, the Supreme Court stated also conversely the proposition that "*State legislation cannot confer jurisdiction upon the Federal Courts*" (Insurance Company *v.* Morse, 20 Wallace 453).

The present question is wholly one of original jurisdiction. In organizing the judicial system under this head, Congress has thought it necessary to exclude expressly any sanction, which might otherwise have been implied, of laws or usages of England, or of any State of the Union, enabling a plaintiff to transfer jurisdiction from the normal seat of justice to any other place where a defendant's property, or a defendant's agent, might happen to be. This was the purpose of the provision of the 11th section of the act of 1789, that no civil suit should be brought against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.

In the absence of such a precautionary express exclusion, it might have been material to inquire whether the Acts of Congress which adopt the laws of the several States, and the practice of the State Courts, would apply to a case like the present, so as to sustain the jurisdiction. What was said in Picquet *v.* Swan, 5 Mason 35, 42, 43, and in Toland *v.* Sprague, 12 Peters, 300, 328, would then have required careful consideration. These cases, and Richmond *v.* Dreyfous, 1 Sumner 131, apply to foreign attachments. There are authorities more directly in point, which render the inquiry unnecessary.

In the Bank of Augusta *v.* Earle, 13 Peters 588, and in other cases, it is established that a corporation, although it may have power to make contracts and incur obligations in a foreign State, can have no legal existence out of the boundaries of the sovereignty by which it is created. "It must dwell in the place of its creation, and cannot migrate to another sovereignty." Therefore a corporation created by one of the States of our Union cannot be an *inhabitant* of another State in which it transacts business, though under an established and recognizable agency.

Day *vs.* The Newark India Rubber Manufacturing Company, 1 Blatchford 628, 631, 632, 633, 634, was the case of a foreign attachment against a corporation of another State. Nelson, J., said that "in order to give jurisdiction to the Circuit Courts, the party defendant must be an inhabitant of the district in which the suit is brought, or he must be found within it at the time of the service of the original process; and this whether the suit be commenced by writ, summons or attachment, or whatever may be the nature or character of the process used." Nelson, J., said further, that according to the true construction of the 11th section of the Act of 1789, the Court would have no jurisdiction in suits instituted against foreign corporations, even in cases where the State practice, if adopted, would authorize the institution of such suits by the attachment of their goods, found within the jurisdiction.

Pomeroy *vs.* The N. Y. and N. H. R. R. Co. (4 Blatchford 121), cannot be distinguished from the present case. A law of New York, which gave certain privileges to a Connecticut corporation transacting business in New York, declared the corporation suable in the same manner as corporations created by the laws of New York, and that the process might be served on an officer or agent of the corporation. The corporation availed itself of the privileges, and submitted to the conditions. There was no doubt that it was suable in the courts of the State of New York. But it was decided that the Circuit Court of the United States, for the Southern district of New York, had no jurisdiction of a suit against the corporation in which the process had been served in the manner thus authorized by the act.

There was a decision of like effect in The Southern Atlantic Telegraph Company *vs.* The New Orleans, Mobile and Texas R. R. Co. in the Circuit Court of the United States, for the Southern district of Mississippi (2 Central L. J. 88).

The re-enactment of the provision in question, in the same words, by the act of 1875, is not unimportant, because the decisions which have been cited had rendered the question familiar.

It was a subject for the practical application of the rule that the construction of a statute forms a part of the statute. If there was any doubt of the correctness of the past interpretation, the form of the re-enactment would have been changed.

This observation was made, since the re-enactment, by Judge Dillon, in a case decided by him in the same manner (Stillwell *v.* The Empire Fire Ins. Co., 4 Central L. J. 463). The strong leaning of that Judge's mind was in a contrary direction, but he said that his decision was according to the view of the law generally accepted and acted upon, and that this was the third case, in seven years, in which it had been attempted in his circuit, by the service of original process on the agents of foreign corpora-

tions, to acquire jurisdiction over the corporations themselves.

In a note to the last-mentioned case (Ib. 464), the reporter cites a similar opinion of the Circuit Court for the Western District of Missouri, in Dollinger *v.* The Farmers', Merchants' and Manufacturers' Fire Ins. Co. The same point had been similarly decided by this Court in an unreported case; and other cases to the same effect are noted in the briefs of counsel.

The only decision to the contrary, which has been mentioned, is that of Knott *v.* The Southern Life Ins. Co., 2 Woods 479. The case appears to have been ruled upon a misconception of the decision in The Railroad Company *v.* Harris, 12 Wallace 65, already cited. By "An Act concerning the District of Columbia," passed on February 27, 1801, section 6, it was provided that no action should be brought before the Circuit Court of that district by any original process, against any person who should not be an inhabitant of, or found within, said district at the time of serving the writ (2 Ll. U. S. 106). This local enactment was in the same words as the provision of the 11th Section of the General Judiciary Act of 1789, which is now in question. So far as the local enactment could, in any wise, have been material to any present question, the provision was repealed by the local enactment of 1867 already cited. This enactment was, that in actions against foreign corporations doing business in the District of Columbia, all process may be served on the agent of such corporation, or person conducting its business aforesaid, or, in case he is absent and cannot be found, by leaving a copy thereof at the principal place of business in the district; and such service shall be effectual to bring the corporation before the Court (14 Ll. U. S. 404). That this was a repeal *pro tanto* there can be no doubt. But repeal *pro tanto* of what? Not of the provision of the 11th Section of the General Judiciary Act of 1789, which never was applicable to the District of Columbia at all, but

of the similar provision of the local act of 1801. The Supreme Court said expressly that the jurisdiction of the Court below was not governed by the 11th Section of the Judiciary Act of 1789, but by acts of Congress local to the district.

This case in 12 Wallace, therefore, on which the present plaintiff chiefly relied, does not in any wise concern the present question favorably to his contention. But the opinion of the Court refers to the case of the Bank of Augusta vs. Earle, in a manner unfavorable to the contention as we understand the subject.

United States, ex relatione *Schollenberger*,

vs.

The Honorable William McKennan and John Cadwalader, Judges of the Circuit Court for the Eastern District of Pennsylvania.

Motion for Peremptory Mandamus.

RELATOR'S BRIEF.

The plaintiffs, citizens of Pennsylvania, sued insurance companies, chartered by New York and other States, on contracts of insurance made in Philadelphia.

The defendants transacted the business in Philadelphia under licenses from Pennsylvania.

They were by statute compelled to have, and did have, agents resident in Philadelphia *on whom process of law can be served.*

The writs were served on those agents.

The court quashed the service on the ground that the companies could not be thus served with Federal process.

I. The jurisdiction *inter* parties is not disputable.

If disputed, it is settled by Jones *vs.* Andrews, 10 Wallace, 332, where it is ruled that an appearance ends the question of jurisdiction, for the plaintiffs are citizens of Pennsylvania. The defendants are corporations of another State. As consent cannot give jurisdiction, this decision is conclusive.

II. That a mandamus is the remedy when a court refuses to entertain a jurisdiction.

The writ goes to the archbishop if exercising judicial functions. Reg. *vs.* Canterbury, 11 Q. B., 483.

To a court declining to exercise judicial functions imposed by law. Reg. *vs.* West R. Justices, 1 New Sep. Ca., 247.

To compel the summoning of a person for not paying poor rates. 3 Bos. and Pull., 220, anon.

To compel making a warrant of distress. 1 Wilson, 133. St. Lukes *vs.* Middlesex.

On a refusal to act because of a statute which did not apply to the case. 4 Queen's B., 877, Reg. *vs.* Bingham.

On a refusal to hear an appeal for reasons which were not legal ones. 8 B. and Cress., 380, Reg. *vs.* Middlesex.

On a refusal because of an erroneous opinion as to sufficiency of grounds. Reg. *vs.* Carnarvon, 1 G. and D., 423.

If refusal is on erroneous point of practice. 3 Q. B., 810, Reg. *vs.* Kistevan.

III. That the Circuit Court did refuse to entertain jurisdiction by quashing the service of the writ for the reasons they did quash this writ, viz., that they had no jurisdiction to compel an appearance on such a service if the service was a good service, and the defendants were thereby brought into court.

The ground for this act of the court is the ground of this application. The writ might have been quashed for informality in the mode of service or other irregularity.

But this service was in accordance with the mode directed by the State law.

1 Purdon's Dig., page 43, section 2. (*By giving notice of the contents and giving a true and attested copy.*) Or because it was out of time, &c., &c.

But the reasons for the action of the court are shown by the grounds taken on the affidavits on which the court acted, and will probably not be denied to have been as stated in the affidavit on which this rule was granted.

And see 13 Wallace 670
23 Wallace 507
4 Otto 455

IV. The question then is, Can the Circuit Court refuse to compel a defendant to appear and plead, or refuse to proceed in the suit, because the defendants were not properly served?

V. The parties are described thus, the plaintiffs as citizens of the State of Pennsylvania, and the defendants were respectively described as a "body corporate, created under the laws of (the proper State) and having its principal place of business in said State, and are a body corporate, exercising within the State of Pennsylvania, under a license granted by the said State, their corporate rights, powers, and privileges in the making of contracts of insurance such as that on which this action is brought."

The defendants made the contract of insurance within the State of Pennsylvania. They had obtained a license from the State, and without that could not have lawfully contracted within the State.

And under that license they were trading as insurers within the State, and within the district and the jurisdiction of the court.

VI. Under the license from the State and as part of the terms they were obliged to have and maintain an agent resident within the State, *on whom process of law can be served.*

The statute, so far as material, reads thus:—

Any such insurance, trust, or annuity company, firm, or association, desiring to transact business in this State, shall first appoint an agent or attorney resident in this State, on whom process of law can be served, and file in the office of the Auditor-General of this Commonwealth a certified copy of the resolution of the board of directors or managers of such company, firm, or association appointing such

agent, &c., &c. (See Purdon's Digest, page 796, section 29; Acts of Assembly of 1868, section 2, page 83.

VII. On this agent the process was served by the marshal. The return states he was the agent, and there is and was no denial of the identity of the person or of the agency for the defendants.

"March 1st, 1878, at Philadelphia, in my district, served the within writ on [here follows the name of the foreign insurance company] by reading the same in the hearing of [here follows name of defendant's agent] agents of said company, and leaving a true and attested copy thereof with him. So answers

"JAMES N. KERNS,
" *United States Marshal.*"

VIII. It was conceded by the court on the judgment quashing the service that this was a proper person and a good service if the process had issued from the State court, and that if this writ had been issued from a State court, and the cause had been then removed into the Circuit Court, the Circuit Court would have had jurisdiction.

The objection seemed to be that the corporation was not an inhabitant, and under the act of 1789, section 11, and the re-enactment of 1872, therefore they could not be served, as they were not an inhabitant and were not found in the district. And that they were neither an inhabitant nor found within the district under these circumstances, so far as Federal jurisdiction is concerned, though they were within the jurisdiction for service of State process.

IX. The relators contend, *first*, that the defendants were, for the purposes of jurisdiction, within the State

where they conducted business; *second*, if this has not been settled to be law, as we think it has, by this and the general acquiescence of all other courts, they were found there by virtue of the license and their acting under it, and their agreement to maintain an agent there for the purpose of being served, coupled with the fact that there was such an agent actually there, and duly appointed to be the person on whom process might be served.

X. The eleventh section of the act of 1789 had no political purpose. It was, as an analysis will show, intended solely to secure a defendant from being compelled to answer at a court sitting within certain territorial limits, where the defendant had never been. But for this limitation writs would have run throughout the dominions of the United States. That it was not intended to secure to the defendant the right to litigate at his *home*, is shown by the alternative *where he may be found*. The defendant could, by staying at home, secure litigation *there*. If he crossed the line he became liable to suit regardless of a cause of action. There is nothing of politics or State rights intended to be protected in a provision that makes them depend on a condition such as that. Comparison with the rule in criminal procedure proves this. And it is apparently supposed by the Circuit Court that it was intended by the statute to exclude the Federal jurisdiction at the option of a defendant, though his business is conducted and his contracts made within the jurisdiction and he is liable to service there under the State laws, and such service is equivalent to a personal service, as it was held to be in 18 Howard, 404.

XI. But under this act and giving it full force, we submit it is settled that a corporation conducting business in a place is resident there *quoad* writs in suits on such contracts.

Lafayette *vs.* French, 18 How., 404. The parties were relatively precisely as they are here. The writ had issued

from a State court and the service was as here, on an agent such as the one in the present cases. The suit was on that judgment.

The points decided were—

The service was binding on all courts, being equal to a personal one. (Page 406.)

The condition imposed of maintaining a resident agent to answer suits on contracts made in the State was reasonable. (407.)

The corporate power to receive service is vested in such agent. (408.)

It is equivalent to naming him in the charter. (*Id.*)

Baltimore and Ohio Railroad *vs.* Harris, 12 Wallace, 65.

There it was ruled the corporation had come into the district under a license to trade. But it remained a Maryland corporation.

The law forbade the service of process as in the act of 1789. 3 Story, Laws of the U. S., 2090, section 6.

The corporation was held to have a *habitat* and to be liable to service in the district from trading there under a license.

There was no statute regulating or authorizing such service. It was prohibited if they were not within. And they were held to be within by acting there under a license to act, and nothing more.

The same point was ruled in England in ignorance of these decisions.

Newby *vs.* Colt's Arms Company, Law. Rep., 7, Queen's Bench, 293. A foreign trading corporation having a place of business in England was held to be a resident and to be served as such and not as a party resident abroad.

Kroll *vs.* Southern Life, 2 Woods, 479, is this very case, admittedly.

The authorities *contra* all go on the ground that a corporation cannot migrate.

What this means for this purpose is not clear when compared with the decision in 12 Wallace, 65, that its existence as a corporation is derived from the State creating it. Its right but not its capacity to act abroad is derived from the permission of the government of that territory, express or implied (pages 82–3); but for all acts there done it is resident there so far as to be liable to suit. (Page 83.)

2. *A fortiori* when entering under an express license from the government of the place. (The same authorities apply here.)

3. Under such a license the express conditions stipulating for a resident on whom process may be served is equivalent to naming that person in the charter as the agent for that purpose.

18 Howard, 404, is express to this point, 12 Wallace 65, that the right to serve is an implied condition of taking a license to trade. 13 Wallace, 285, where Field, J., commenting on this decision, states it to have decided that the licensing act merely enlarged the sphere of its operations and made it liable to be served in any State granting the license, which had been acted under. 4 Otto, 177, puts the point on higher grounds.

4. This extends to all legal process which can be served within the State. Per Sharswood, J., Newhall *vs.* Atlantic, 28 Leg. Int., 308.

5. It is not confined to process of the courts of the State. It was not so intended nor has the State so expressed its intention.

6. The State having thus created the agent and mode of serving process, whatever was their intention it was lawful for Congress to adopt that mode or any other, either of State invention or its own.

7. Congress had adopted the modes used in the State in 1789, and the courts had more or less extended this to recent inventions of the State. Wayman *vs.* Southord, 10 Wheat., 32, 41, Marshall, Ch. J., laid down the rule ever since observed, that the act of 1789 adopted the then existing rules of the States, as to executing process, from first to last as the mode to be followed.

8. In 1872 Congress adopted the then existing State forms and those that might thereafter be adopted by the States on this subject. Statutes at Large, 197.

Therefore, we have the case of a jurisdiction existing *inter* parties. The defendants were served in the manner authorized by the State law in 1868. That law is now (1872) made the law of the United States courts by act of Congress, as to the mode of serving process.

And the defendant was within the jurisdiction. Its contract with the state to be there for suit, made it an inhabitant, for so far as liability to be served in all suits.

It was a corporate consent that such service should be effectual if made on that agent.

And this extended to the process of any court that by the law could be served there.

If the consent of the State or its intention to secure this benefit to suitors in the Federal courts is important, it did give it,—for it had by uniting in the Federation, consented to the service of process of the Federal courts within its borders, and it did not, if it could, exclude that process from the benefit of any regulation it made for its own.

And this regulation was adopted by Congress. Therefore the act of the court was an illegal refusal to exercise

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The JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS.

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RICHARD P. WHITE,
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SCHOLLEBERGER, *et. al.*,
vs.
FOREIGN INS. COMPANIES.

RULE TO SHOW CAUSE WHY MANDAMUS SHOULD NOT ISSUE.

Defendants' Brief.

The object of this proceeding is to compel the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania to hear and determine certain suits, the writs issuing in which have been quashed on the ground that they issued against foreign corporations not inhabitants of, nor found within, the district.

I. Mandamus is not the proper remedy.

The writs were quashed on motion, after full argument and a judicial decision of the question of jurisdiction.

The question was properly raised on motion, and the determination of it was an exercise of the judicial functions.

The writ of mandamus will not lie to compel an inferior Court to reverse its decision, in refusing to dismiss a bill of complaint, since, in passing upon such dismissal, the Court must necessarily have exercised its judicial function, thus placing the question at issue beyond the control of a mandamus.

The dismissal by an inferior Court, of an appeal from a Justice of the Peace, for want of jurisdiction, is not ground for a mandamus to reinstate appeal.

High, on extraordinary remedies, § 173.

The Supreme Court of the United States will not, by mandamus, compel an inferior Court to reverse a decision which it has made in the ~~excession~~ exercise of its legitimate jurisdiction That is the office of a writ of error or appeal; *ex parte* Flippin, 4 Otto 350. Citing Goheen *vs.* Myers, 18 B. Monroe 427, in which it was said: "The dismissal of the appeal for want of jurisdiction, was the judicial determination of a question incident to every judicial proceeding."

Otto 71

It was properly raised by motion, and its decision, though preliminary to any adjudication of the merits, was indispensable, and altogether within the judicial powers and discretion of the Court. The judge, in passing upon the question of jurisdiction, was obviously acting in a judicial and not a ministerial character, and in such case, as already stated, a mandamus will not lie against him for the correction of his judgment, however erroneous it may be.

If mandamus is the proper remedy, each defendant is entitled to be heard in a separate proceeding in his own case.

In some of the cases huddled together in this anomalous proceeding the writs were in fact served upon the agents designated to accept service of process under the provisions of the State law, but in a number of them the writs are returned as served on persons named as agents, who, although agents for some purposes, were not agents for the purposes of service, and upon whom a service, even of State process, would have been fatally defective (see affidavits annexed).

The cases, therefore, stand on different grounds, and differing points are involved in them.

II. The writs were properly quashed because they were issued against artificial persons who were not inhabitants of the district, nor found within it.

The Act of Congress, March 3d, 1875, provides that "no civil suit shall be brought before either of said courts against any person, by any original process or proceeding in any other district than that *whereof he is an inhabitant, or in which he shall be found* at the time of serving such process. * * *"

Corporations cannot migrate; they can have no existence outside the limits of the sovereignty which creates them and their officers lose their official character when outside those limits.

Bank of Augusta vs. Earle, 13 Peters 588.
Wheeler vs. O. & M. R. R., 1 Black 287.
Newell vs. Gr. & W. R. R., 19 Mich 336; 4 Blatch 120.

It may be argued that under the State law, service may be made upon a foreign corporation through its agent, and that by virtue of the Act of Congress, requiring conformity of process and procedure, service which would be good in a State court will be adopted by the Federal courts.

But 1st. The return upon these writs does not show that the companies defendant had complied with the State law, and the averment in the Declarations, filed subsequent to the motion to quash, cannot supply this defect. Under the State act service must be made on the agent *designated by the company to receive service of process at his office or place of business.* Service on any other agent, or at any other place, is no service at all.

Liblong vs. Kansas Fire Ins. Co., 82 Penn'a. State Rep. (1 Norris), 413.

The returns of service in this case stand on all fours with that of Liblong *vs.* Kansas, and would have been quashed in a State Court as in this.

2d. Even if the service had been such as would have been held good in the State Court, which it was not, the Act of Congress requiring conformity of procedure does not make it good in a Federal Court.

That act provides ~~only~~ for assimilation of process and procedure where jurisdiction exists. Where process may issue, and where proceedings may be had, they shall conform to the process and procedure of the State Courts. But where the Federal Court has no power to issue process or to proceed, no such power is or can be conferred by State legislation.

Toland vs. Sprague, 12 Peters 323.
Levy vs. Fitzpatrick, 15 Peters 171.
3 Dillon 474; 6 Bissell 26.
2 Woods 439; 2 Abbott 341.
Home Insurance Co. vs. Morse, 20 Wall. 445.

The Act of Congress of 1875 expressly prohibits the commencement of a suit in the Circuit Court against a person not an inhabitant of or found within the district. To hold that this prohibition may be set at naught by a service under the State act, would be to hold that State legislation may override a Federal law in relation to the jurisdiction of a Federal Court, which would be absurd.

The Pennsylvania Act is strictly a measure of State policy, looking to the protection of its own citizens, and to the administration of justice through its own tribunals.

It provides a system, which can only be properly administered through its own officers, and in its own courts, and it expressly excludes all others, therein differing from the legislation of many of the other States, and notably from that of *Alabama*, and from that of Congress in the *District of Columbia.*

Its main provisions are that no Foreign Insurance Company shall do business within the State, until it shall have Made a statement of its assets.

Filed a copy of its charter with the Insurance Commissioner.

Filed a copy of its resolution appointing an agent.

Filed its letterof attorney to an agent to accept service of process.

Filed its bond to the State.

Procured a State license.

The Insurance Commissioner is a State Officer, and these papers are in the State archives. The whole system is an intro-state one, with which the Federal courts can have no concern.

The law further provides that before such foreign company shall transact any business within the State, it shall file with the Insurance Commissioner a written stipulation, agreeing that any legal process affecting the company may be served on the Insurance Commissioner, or the person designated by him, or the agent specified by the said company to receive service of process, with the same effect as if served personally within the State.

The act moreover expressly provides that the process which the company agrees shall be so served, is any writ, summons, etc., issuing upon any action, suit, etc., brought *in any court of this Commonwealth*, having jurisdiction.

Now service under this act can only be held good either because, as was said by Chief-Justice Waite, in Home Ins. Co. *v.* Morse, in his dissenting opinion discussing the Wisconsin law, the company, as to State litigation, renounces its foreign citizenship, and becomes *pro tanto* a citizen of the State in which it has consented to be served; or because the company has, by its contract, consented to be sued and bound itself to accept such service as *is* provided for.

But if the corporation has been constituted a Pennsylvanian corporation *pro tanto*, then the Federal Court has no jurisdiction, as both the parties to the action are, for the purposes of suit, citizens of Pennsylvania, and when a

corporation *exists* in two States, it cannot be sued in the Federal Courts by the citizens of either State.

1 Black 288.

51 Penna. St. Rep. 228.

If, however, it be held that the validity of the service depends upon the contract, the Federal Courts can take no jurisdiction under it: 1st, Because the United States was neither party nor privy to it; 2d, Because the contract, by its terms, is expressly limited to process in a suit brought *in any Court of the Commonwealth of Pennsylvania.*

It is true that it has been sometimes said that the Constitution of the United States is the Constitution of the State of Pennsylvania, and that the Federal Courts of the District are Pennsylvania Courts.

This no doubt, in a certain sense, is true, just as United States law is Pennsylvania law; but such an argument is mere play upon words. The words "Court of the Commonwealth of Pennsylvania," were used by the State Legislature to designate its own State Courts, and the plain intent was to exclude the process of the Federal Courts, for what other Courts, not being Courts of the State could issue process or bring suit within the State of Pennsylvania.

What apter words could have been used to designate the State Courts than Courts of the Commonwealth of Pennsylvania?

If Federal Courts are Courts of the State of Pennsylvania, then they are State Courts and are Pennsylvania Courts, so that none of the terms which have hitherto been used to distinguish the State from the Federal Courts would be free from the objection urged here.

The very question at issue in this proceeding has been passed upon frequently, and in many different circuits, and, with the single exception of a case (2 Woods 479) in Alabama, (where the State statute differs from the one under consideration in not restricting the agreement to State process) the decisions are uniform that a corporation cannot

be sued outside the Sovereignty which created it, and that State legislation cannot extend the jurisdiction of a Circuit Court to a corporation outside its district. The following:

Pomeroy vs. N. Y. & New Haven R. R. C. C., U. S. South District, N. Y., 4 Blatch. 121.

Leonard vs. Lycoming Ins. Co. C. C., U. S. Cleveland.

Day vs. Newark Rubber Co., 1 Blatch. 628.

Southern Atlantic Tel. Co. vs. N. O., Mobile & Texas R. R., C. C. U. S., So. Dist. Miss., 2 Central Law J. 88.

Abbott's Pr. (3 Ed. 34).

An elaborate argument was made in the Court below, to show, that a corporation which transacts business within a district, is an inhabitant of and may be found within it. In support of this position were cited the following cases:

Railroad vs. Harris, 12 Wallace 67.

The opinion in this case contains one or two sentences which, separated from the context, might seem to support the plaintiffs' contention, but when considered in view of the facts of the particlar case, any signification of that sort vanishes.

The suit was against a Maryland corporation brought in the District of Columbia under Act of Congress of Feb. 22, 1867, which provides that in actions against Foreign Corporations, doing business within the district, service may be made upon the agent conducting the business, etc. It is with reference to this legislation that Judge Swayne says: "A corporation cannot migrate, but may exercise its authority in a foreign territory upon such conditions as may be prescribed by the law of the place; one of these conditions may be that it shall consent to be sued there. If it do business, it will be presumed to have assented, and will be bound accordingly."

That is to say, looking at the context, when the corporation could not lawfully do business without having con-

sented to be sued, it will be taken to have assented before it transacted business. It will be presumed to have complied with the law, not to have violated it.

This, it will be seen, does not touch the question under discussion in the remotest degree. No one questions the right of Congress to pass such a law, nor its right to pass a similar law as to the service of writs issuing out of the Federal courts in this State, but no such law is in force in Pennsylvania. On the contrary, we have the act that the citizen shall not be sued out of his district.

Knott vs. Southern Life Co., 2 Wood, Ala., 480.

This is the only case in which a Federal court has held that service of Federal writs can be made under the provisions of State legislation. The learned Judge bases his decision, first upon the ruling in R. R. *vs.* Harris, cited above, which it will be seen was a misapprehension, as that decision was under the local Acts of Congress applicable to the District of Columbia, and has no bearing as to the effect of State legislation upon the service of Federal writs. Second, upon the fact that under the Alabama statute, the company had consented that service upon its agent should be sufficient without *restriction as to the Courts out of which the writ should issue, and that consequently the consent extended to Federal writs.*

The legitimate inference to be drawn from the language of the Court is that under the Pennsylvania statute, by which the consent is restricted to process issuing out of a Pennsylvania court, the decision must be the other way. This is therefore a decision against the Plaintiffs' contention, and it should be noted that these cases were decided before the Act of 1875.

Lafayette vs. French, 18 Howe.

Lafayette *vs.* French, 18 Howe, was a case brought in the State Court and removed under the statute. The decision is merely to the effect that the State statute providing for service of State process on resident agents, as the condition of their being permitted to transact business

within State limits, is proper, reasonable and constitutional, which is not questioned in this case.

Colt's Manufacturing Co., 7 L. R., Q. B., 293.

This was a rule to set aside service of a writ where the defendant, an American corporation, had a place of business in England, and carried on its business there just like an English corporation.

The Court said that under the circumstances it would not stop the plaintiff from proceeding, but would leave it open to the corporation to raise the question after appearing on the record.

This is the extent of the decision, but the Court said that if it had only appeared that the company contracted through an agent, it would have been regarded as non-resident, citing Carson Iron Co. *vs.* McLaren, 5, House of Lords Cases, 459, in which it was decided that a Scotch corporation possessing property in England, and having agents resident there, was a non-resident.

In the case under consideration, there was nothing before the Court below but writs, which upon their face showed that defendants were Foreign corporations, and therefore, presumably, artificial persons, non resident, and who could not enter or be found within the district, and the returns upon such writs. which allege merely that they had been served upon certain persons, agents of the defendants.

No allegation is to be found in either writs or returns of service that the defendants had complied with the requirements of the State statute, nor that the agents on whom service was alleged to have been made, were the agents appointed for that purpose, nor that the service was made at the licensed place of business, all of which would be required to make the service good in a State Court.

Liblong v. Ins. Co., 82 Pa. State R. 413.

In point of fact, as to many of the writs, the service was not made on the agents designated under the State

law, and one of the incongruities of holding the State legislation applicable to process of the Federal Courts, is that it puts upon the U. S. Marshal the duty of ascertaining what can be gleaned only from the State archives, to wit, whether, in point of fact, the defendant has taken a State license, complied with the requirements of the State law, and, if so, who is the duly appointed agent to accept service. How is a Federal officer to acquire this information? What authority has he to inspect the State records, and without doing so how can he effect a service of which compliance with every requirement of the State law forms a part?

To escape these difficulties, the plaintiff contends that the mere fact that the defendants transacted business in the State carries with it the presumption that they are, in the words of the act, found within the district, but, as has been said more than once in this Court, no distinction can, as to process, be taken between natural and artificial persons, and, certainly, no lawyer will contend that service of a writ could, without special legislation, be made upon the agent of a non-resident merchant.

We have shown that the current of authority, so far as the point has come up for decision in the different circuits, is flatly against the plaintiffs.

That the cases relied upon to support his position, fall far short of doing so, and if more is needed we point to the fact that the passage of laws by almost every legislature in the country, legalizing services upon agents by agreement, and the passage of similar acts by Congress for the District of Columbia, show the universal judgment to be first, that doing business within a district does not constitute a residence on the part of a corporation, or a finding within such district. Second, that State legislation cannot warrant suit in a Federal Court against a citizen, not resident, and not found within the district where such suit is brought.

It may be urged here, as it was below, that if the writs had been issued out of the State Courts, they could have been removed, under the Act of Congress, into the Circuit Courts, and the effect would be the same.

But admit this to be so, and it is only a reason for additional legislation on the part of Congress. Under such circumstances it might be well either to repeal a prohibition which can be so easily evaded, or to forbid the evasion; but so long as the prohibition in the act is in force, it must be obeyed.

When the question arises, however, we are not prepared to admit that such suits can be removed by the resident plaintiff against the protest of the foreign company.

It has been held that the company defendant can remove, but that presents an entirely different question, as it is its right to waive the protection of the Act of Congress, and to consent to be sued out of his district.

When the defendant refuses to consent, it is submitted that, neither directly nor indirectly, can he be brought into a Federal Court outside his district, and that a compulsory agreement under the State law can no more deprive him of the protection of the Act of Congress, when he desires to stay out of the Federal Court, than it could deprive him of his constitutional right to go into the Federal Court when he desires so to do.

See *Home Ins. Co. v. Morse, 20 Wall. 445.*

This question, it will be observed, was saved in Warner *v.* Pa. R. R., 12 Blatch 231, where it is said the company having itself removed the case could not object to the jurisdiction.

JAMES H. HEVERIN,
R. P. WHITE,
Counsel for Defts

APPENDIX.

SCHOLLENBERGER
vs.
THE PHŒNIX,
OF HARTFORD.

C. C. OF U. S.,
E. D. OF PA.
APRIL SESSION, 1878.
119.

COUNTY OF PHILADELPHIA, } *ss.*
STATE OF PENNSYLVANIA, }

William L. Boswell, being duly sworn, says: That he is informed and believes the writ in the above case was returned as having been served upon Charles P. Herring, one of the firm of Prevost & Herring, Agents. That the said Charles P. Herring is not and was not, at the time of the service of said writ, the attorney or agent named or authorized by said Company defendant, either to accept service of process, or upon whom such service could be made under the Statute of Pennsylvania. Deponent further says that he was and is the attorney in fact of the defendant Company, and the only party in Pennsylvania authorized to accept service of writs issued against said Company, and the only party in the State upon whom they could be legally served. And that the writ in this action had never been served upon him, nor had he accepted service of the same; and that deponent's authority as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

W. L. BOSWELL.

Sworn and subscribed to before me, this 20th day of April, 1878.

THOMAS W. BARLOW,
Notary Public.

[SEAL.]

SCHOLLENBERGER,
vs.
THE CLINTON INSURANCE COMPANY
OF NEW YORK.

C. C. OF U. S..
E. D. OF PENNA.
APRIL SESSION, 1878.
84.

COUNTY OF PHILADELPHIA, } ss.
STATE OF PENNSYLVANIA. }

Charles E. Mather, being duly affirmed, says: That the writ in the above case was returned as having been served upon "Charles Williams, a partner of Mather & Co., agents." That the said Charles Williams is not and was not at the time of the service of said writ, attorney or agent named or authorized by the said defendant, either to accept service of process, or upon whom such service could be made under the statute of Pennsylvania.

Deponent further says, that he is the attorney in fact of the defendant company, and the only party in Pennsylvania authorized to accept service of writs issued against said company, and the only party in the State upon whom they could be legally served; and that the writ in this action had never been served upon him, nor had he accepted service of the same. And that deponent's authority as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

CHAS. E. MATHER.

Sworn and subscribed to before me, this 20th day of April, 1878.

THOS. W. BARLOW,
Notary Public.

[SEAL.]

SCHOLLENBERGER,
vs.
THE ROGER WILLIAMS INSURANCE CO.
OF RHODE ISLAND.

C. C. OF U. S.,
E. D. OF PENNA.
APRIL SESSION, 1878.
94.

STATE OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA. } *ss.*

Charles E. Mather, being duly affirmed, says: That the writ in the above case was returned as having been served upon "Charles Williams, a partner of Mather & Co., Agents." That the said Charles Williams is not, and was not, at the time of the service of said writ, the att'y or agent named or authorized by the said defendant, either to accept service or process, or upon whom such service could be made under the statute of Pennsylvania.

Deponent further says, that he is the att'y in fact of the defendant company, and the only party in Pennsylvania authorized to accept service of writs issued against said company, and the only party in the State, upon whom they could be legally served, and that the writ in this action has never been served upon him, nor has he accepted service of the same, and that deponent's authority as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

CHAS. E. MATHER.

Sworn and subscribed to before me, this 20th day of April, A. D. 1878.

THOMAS W. BARLOW,
[SEAL.] Notary Public.

SCHOLLENBERGER,
vs.
THE COMMERCIAL UNION INS. CO., OF LONDON.

C. C. OF U. S.,
E. D. OF PENNA.
APRIL SESSION, 1878.
102.

COUNTY OF PHILADELPHIA, } ss.
STATE OF PENNSYLVANIA. }

W. E. Bullus, being duly sworn, deposes and says: That he is informed and believes, that the writ in the above case was returned as having been served upon this deponent, a partner of J. Paulding, agents. That this deponent is not and was not, at the time of the service of said writ, the attorney or agent named or authorized by the said defendant company, either to accept service of process, or upon whom such service could be made under the statute of Pennsylvania.

Deponent further says, that Tatwell Paulding was and is the attorney in fact of the said defendant Company, and the only party in Pennsylvania authorized to accept service of writs issued against said company, and the only party in the State upon whom they could be legally served; and that the writ in this action was never served upon the said Tatwell Paulding, and that he has never accepted service of the same. That the authority of Tatwell Paulding as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

WM. E. BULLUS.

Sworn and subscribed to before me, this 20th of April, 1878.

THOMAS W. BARLOW,
Notary Public.

[SEAL.]

SCHOLLENBERGER,
vs.
THE FIRST NATIONAL
OF MASS.

C. C. OF U. S.
E. D. OF PA.
APRIL SESSIONS, 1878.
87.

COUNTY OF PHILADELPHIA,
STATE OF PENNSYLVANIA. } *ss.*

Charles Tredick, being duly , says: That the writ in the above case was returned as having been served upon "Charles Tredick, one of the firm of Whiton & Tredick, Agents." That the said Charles Tredick is not, and was not at the time of the service of said writ, the attorney or agent named or authorized by said Company defendant, either to accept service of process, or upon whom such service could be made under the Statute of Pennsylvania. Deponent further says that James H. Sherrard was and is the attorney in fact of the defendant Company, and the only party in Pennsylvania authorized to accept service of writs issued against said Company, and the only party in the State upon whom they could be legally served. And that the writ in this action has never been served upon him, the said James H. Sherrard. Nor has he accepted service of the same, and that the said James H. Sherrard's authority as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

CHARLES TREDICK.

Sworn and subscribed to before me, this 20th day of April, 1878.

THOMAS W. BARLOW,
[SEAL.] Notary Public.

SCHOLLENBERGER,
vs.
THE MANHATTAN FIRE INS. CO. OF GREAT BRITAIN.

C. C. OF U. S.,
E. D. OF PENNA.
APRIL SESSIONS, 1878.
112.

COUNTY OF PHILADELPHIA, } *ss.*
STATE OF PENNSYLVANIA. }

James H. Sherrard, being duly sworn, says: That he is informed and believes that the writ in the above case was returned as having been served upon this deponent. That this deponent is not, and was not, at the time of the service of said writ, the attorney or agent named or authorized by the said company defendant, either to accept service of process or upon whom such service could be made under the statute of Pennsylvania.

Deponent further says: That Thompson Derr was and is the attorney in fact of the defendant company, and the only party in Pennsylvania authorized to accept service of writs issued against said company, and the only party in the State upon whom they could be legally served; and that the writ in this action has never been served upon the said Thompson Derr, nor has he accepted service of the same; and that the said Thompson Derr's authority as agent is duly filed with the proper officer of the Commonwealth of Pennsylvania.

JAMES H. SHERRARD.

Sworn and subscribed to before me this 20th day of April, 1878.

THOMAS W. BARLOW,
Notary Public.

[SEAL.]